

LAWRENCE JACKSON ET AL.,	:	Order Dismissing Appeal
Appellants	:	
	:	
v.	:	Docket No. IBIA 97-48-A
	:	
MUSKOGEE AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	February 3, 1998

Appellants Lawrence Jackson et al. seek review of a September 11, 1996, decision issued by the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA). 1/ The decision concerns the issuance of Certificate of Degree of Indian Blood (CDIB) cards. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal.

The Notice of Appeal filed in this matter identified the Appellants as the Dorsar-Barkus and Bruner Bands of the Seminole Nation (Bands). In its November 1, 1996, Pre-docketing Notice, the Board stated:

The notice of appeal stated that the decision being appealed concerned the denial of the issuance of [CDIB] cards to members of the Seminole Nation who could trace their ancestry to the 1906 Dawes Roll of Seminole Freedmen. Because CDIB cards are issued to individuals, not to Bands, the Board finds that the Bands are not proper appellants to maintain this appeal. Counsel is therefore

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1/ The Sept. 11, 1996, decision was signed by the Muskogee Area Trust Officer. Because under 25 C.F.R. § 2.4(e), the Board has jurisdiction to review decisions of BIA Area Directors, not officials subordinate to the Area Director, the Board gave the Muskogee Area Director an opportunity to state whether or not he concurred in the decision.

Departmental counsel responded stating that the individual then serving as Acting Muskogee Area Director had formerly served as the Superintendent, Wewoka Agency, BIA (Superintendent), and, in that capacity, had issued the decision which was under review. Counsel further stated that the Acting Muskogee Area Director had recused himself from consideration of the appeal and, by memorandum dated Mar. 21, 1996, the Deputy Commissioner of Indian Affairs appointed the Muskogee Area Trust Officer as the appellate official to review the decision at the Area level.

By order dated Dec. 23, 1996, the Board concluded "that, for purposes of this appeal only, the Area Trust Officer stands in the place of the Area Director." Order at 2.

Therefore, the Board uses the designation "Area Director" for the deciding official in this case.

instructed to identify the individuals whom he represents and to provide proof of representation.

The Notice of Appeal did not include a copy of the September 11, 1996, decision. The Board's November 1, 1996, order was issued, however, in the belief that the Bands had filed an appeal on behalf of their individual members who had applied for, and been denied, CDIB cards.

Counsel for the Bands subsequently identified 32 individuals as appellants. By order dated December 23, 1996, the Board substituted the first-named individual, Lawrence Jackson, for the Bands as the Appellant, and stated that it considered "that Jackson represents other similarly situated individuals." Order at 1. By the latter statement, the Board was referring to the remaining identified individuals. Assuming arguendo it would have authority to do so, the Board did not certify this as a class-action appeal.

The Board's request for the identification of individuals and substitution of those individuals as the appellants led to a round of motions and responses addressing the question of whether any of the individuals identified had actually requested and been denied a CDIB. Contending that only seven of the identified individuals had applied for a CDIB, and that those applications were still pending at the Agency level, the Area Director moved that the appeal be remanded as to those seven individuals, and dismissed as to the remaining individuals.

Perhaps prompted by the pendency of this appeal, the Wewoka Agency reviewed its files and determined that it had denied the CDIB applications of 64 individuals because they listed only ancestors on the Freedmen rolls. It was further found that these individuals had not been notified of the right to appeal from the Superintendent's decisions. The Area Director states that on or about June 9, 1997, the Agency sent out additional letters notifying these individuals of their right to appeal.

Appellants subsequently sought to join Rashon Jones, Romon Jones, and Theola Cudjo as appellants. Appellants stated that the three individuals they sought to join were among the 64 individuals who received notice of appeal rights as described in the preceding paragraph. The motion states that these three individuals filed timely appeals. Nothing in Appellants' motion, or any subsequent filing, stated that the Area Director had issued a decision in those appeals. The Area Director opposed this motion.

The Area Director filed another motion, seeking dismissal of this appeal on the grounds that the Board lacks jurisdiction over the issuance of CDIB cards under 25 C.F.R. Part 62. Appellants opposed this motion.

After further review of the record and the filings in this matter, the Board agrees with the Area Director that the question which he addressed in his September 11, 1996, decision was "the academic question of whether CDIB cards will be issued to applicants who have not presented proof of Indian blood," Decision at 2, and who trace their ancestry only to individuals on the Seminole Freedmen rolls. The Board's request for the identification of individual appellants has been construed as converting this question into one concerning the application of that academic question in the real world.

The Board concludes that this appeal must be dismissed regardless of whether the question before it is viewed in its academic sense or in light of the denial of specific CDIB applications.

In regard to the "academic question," the Board does not have authority to issue advisory opinions. See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services), 18 IBIA 450 (1990). The Board has specifically interpreted this to include a lack of authority to issue a decision in the absence of-or in advance of-an actual case in controversy. Horse v. Anadarko Area Director, 29 IBIA 175 (1996). As presented to the Superintendent, the Area Director, and apparently the Board, this appeal raised a question without an actual case in controversy. The Board concludes that it lacks authority to issue a decision on the academic question of whether CDIB cards can or should be issued to individuals who trace their ancestry only to persons listed on the Seminole Freedmen rolls.

Also, the Board agrees with the Area Director that it lacks authority under 25 C.F.R. Part 62 to consider appeals from the denial of CDIB cards to specific applicants. Part 62 applies to "adverse enrollment actions," which are defined by section 62.4(a)(6) to include "[t]he certification of degree of Indian blood by a Bureau official which affects an individual."

Sections 62.9 through 62.11 of 25 C.F.R. establish special procedures for enrollment appeals. As discussed in McClure v. Acting Muskogee Area Director, 27 IBIA 154, 155 (1995), if an adverse enrollment decision is made by a Superintendent or tribal committee, an appeal may be taken to the Area Director, who can either issue a decision final for the Department, or waive his authority to issue a final decision and refer the appeal to the Assistant Secretary - Indian Affairs. If an adverse enrollment decision is made by an Area Director, an appeal may be taken to the Assistant Secretary, who issues a decision final for the Department. The Board is not part of this appeal process. 2/ See also Grosvenor v. Sacramento Area Director, 22 IBIA 193 (1992).

Thus, regardless of the way in which this appeal is viewed, the Board lacks authority to review the decision(s).

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2/ As discussed in the Summary preceding the Federal Register publication of amendments to Part 62,

"the [appeal] procedures contained in [prior] Part 62 apply to appeals from some adverse enrollment actions while the procedures contained in 25 CFR Part 2, which provide procedures for appeals from administrative actions by BIA officials, apply to appeals from other adverse enrollment actions. This has resulted not only in confusion over which rule governs an appeal from a particular enrollment action, but also in different procedures being applicable to individuals who may be appealing from essentially the same enrollment action. The intent of the revision, therefore, is to provide uniform appeal procedures from adverse enrollment actions where individuals have a right to appeal the action to the Secretary. 52 Fed. Reg. 30,159 (Aug. 13, 1987).

Appellants discuss a judgment fund awarded to the Seminole Nation of Oklahoma by the Indian Claims Commission in Seminole Nation of the State of Florida and Seminole Nation of Oklahoma v. United States, 38 Indian Cl. Comm. 91 (Docket Nos. 73 and 151). The Area Director contends that Appellants did not raise this issue before either the Superintendent or the Area Director, and therefore argues that the Board should not consider it. The Area Director also indicates that this issue is the subject of litigation in Davis v. United States, CIV 96-1988-M (W.D. Okla.).

Appellants contend that issues relating to the judgment fund were raised in the appeals filed with the Area Director by Rashon Jones, Romon Jones, and Theola Cudjo, whose appeals Appellants seek to join.

The Board finds that it need not decide whether this issue was raised below or whether it has been raised in other proceedings by individuals who are presently not part of this appeal. The issue was clearly not raised in the Notice of Appeal which initiated this case. That Notice of Appeal sought review of the Area Director's September 11, 1996, decision, which did not address any issue relating to the judgment fund. The Board finds that no issue relating to the judgment fund is before it.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal from the Muskogee Area Director's September 11, 1996, decision is dismissed. 3/

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Kathryn A. Lynn  
Chief Administrative Judge

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Anita Vogt  
Administrative Judge

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3/ All motions not addressed are hereby denied.